2001

State of Utah v. Kipp Phillips, Dennis Horn, and Jerry McCright : Brief of Respondent

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

KIPP PHILLIPS, DENNIS HORN, and JERRY McCRIGHT,
Defendants and Appellants.

Case No. 13816

BRIEF OF RESPONDENT

Appeal from the judgment of the District Court of the Second Judicial District in and for the County of Weber, State of Utah, Honorable Calvin Gould, presiding.

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STATEMENT OF THE NATURE OF THE CASE

The appellants appeal from convictions of the crime of distributing pornographic material pursant to Utah Code Ann. § 76-10-1204 (Supp. 1973), by the Second Judicial District Court, Weber County.

DISPOSITION IN LOWER COURT

Each of the appellants was separately charged and found guilty of distributing pornographic material in

Ogden City Court (R-14, 15)*. Thereafter, the cases were consolidated on appeal to the Second District Court, Weber County, where the sole issue was the constitutionality of Utah Code Ann. § 76-10-1204 (Supp. 1973). The Court, through the Honorable Calvin Gould, held that the section in question was constitutional and that each of the appellants was guilty as charged (R-49).

RELIEF SOUGHT ON APPEAL

Respondent prays that the convictions of the lower court be affirmed.

STATEMENT OF THE FACTS

Appellants were convicted of a Class "B" misdemeanor and sentenced to pay a fine of $299.00 in the Ogden City Court for distributing pornographic material, in violation of Utah Code Ann. § 76-10-1204 (Supp. 1973) (R-3). Each of the appellants appealed their conviction to the Second Judicial District Court, Weber County (R-17). Appellants stipulated on said appeal that the publications entitled *Pole & Hole, Climax* and *Love Thirsty,* respectively, were purchased by Ogden City police officers from the named appellants at the Adult Book and Cinema Store in Ogden (R-143). These publications are part of the record before this court. Appellants further stipulated that the only issue before the

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*The Record references cited are to the Kipp Phillips file, Second Judicial District Court, Weber County, Crim. #10941, which is identical for purposes of this appeal to the files of the other two appellants.

trial court was the constitutionality of Utah Code Ann. § 76-10-1204 (Supp. 1973) and conceded that if said section was held to be constitutional their convictions should be affirmed (R-144).

Appellants (R-51-133; 43-48) and respondent (R-20-44) having filed memoranda in support of their respective positions, the Honorable Calvin Gould held that the statute was constitutional and each of the appellants guilty as charged (R-49).

ARGUMENT

POINT I.

OBSCENITY IS NOT SPEECH AND IS NOT PROTECTED BY THE FIRST AMENDMENT.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." Relying upon social and legal history, the United States Supreme Court has repeatedly held that "obscene" speech or writing is not protected by the constitutional guarantees of the First Amendment. *Roth* v. *United States*, 354 U. S. 476, 1 L. Ed. 2d 1498 (1957); *Miller* v. *California*, 413 U. S. 15, 93 S. Ct. 2607 (1973); and other cases. The reasoning of the court in *Roth* was that because obscenity is devoid of any value, it should not be considered speech at all, and thus need not be afforded constitutional protection.

POINT II.

UTAH'S STATUTE MEETS THE REQUIREMENTS OF THE UNITED STATES SUPREME COURT.

Prior to June, 1973, the leading obscenity decision of the United States Supreme Court was *Roth* v. *United States* 354 U. S. 476 (1957). The *Roth* Court cited with approval (at p. 487) the definition of obscenity as contained in the American Law Institute Model Penal Code.* Thereafter, the drafters of the Utah Penal Code, adopted in 1973, attempted, it has been said, to comply with *Roth*, and a later United States Supreme Court decision, *A Book* v. *Attorney General of Massachusetts*, 383 U. S. 413 (1966).** They provided in Utah Code Ann. (1953) § 1203(1) (1973 Supp.) the definition of pornography*** as follows:

> "(1) Any material or performance is pornographic if, considered as a whole, applying contemporary community standards;
>
> (a) Its predominant appeal is to prurient interest; and
>
> (b) It goes substantially beyond customary

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*ALI, Model Penal Code § 207.10(2) Tent. Draft No. 6, 1957.

**Loren Dale Martin, *Utah Criminal Code Outline*, Utah Law Law Enforcement Planning Agency (1973), pp 232-234.

***The terms "obscentity" and "pornography" appear to be used interchangeably by the courts, commentators, and legislatures.

> limits of candor in the description or representation of nudity, sex, or excretion."

This section is the heart of appellants' constitutional challenge.

In June, 1973, the Supreme Court, in a series of decisions beginning with *Miller* v. *California,* 413 U. S. 15 93 S. Ct. 2607 (1973), formulated "concrete guidelines to isolate 'hardcore' pornography from expression protected by the First Amendment." *Id.* at 29. *Miller* requires that for legislation to constitutionally regulate obscenity the legislation must only prohibit works which:

> 1. " depict or describe sexual conduct . . . specifically defined by the applicable state law, as written *or authoritatively construed* (emphasis added)." *Id.* at 2615.
>
> 2. "taken as a whole, appeal to the prurient interest in sex [and] portray sexual conduct in a patently offensive way . . ." *Id.* at 2615.
>
> 3. ". . . and which . . . do not have serious literary, artistic, political, or scientific value." *Id.* at 2615.

A. *The Utah Statute Defines Prohibited Sexual Conduct In Such A Way As To Give "Due Process" Notice.*

The first element of *Miller* requires that the proscribed sexual conduct be defined, *either by statute or by judicial construction,* with enough specificity to give

a person wishing to comply with the law that notice inherent in the concept of due process. The degree of specificity required was stated in *Roth* as follows:

> "This court, however, has consistently held a lack of precision is not itself offensive to the requirements of due process . . . The constitution does not require impossible standards; *All that is required is that the language conveys sufficiently definite warning* as to the proscribed conduct when *measured by common understanding* and practices. *U.S. v. Petrillo,* [citation omitted] . . . that there may be marginal cases in which it may be difficult to determine the side of the line on which a particular fact situation falls *is no sufficient reason to hold the language too ambiguous to define a criminal offense.* [8 citations omitted] (Emphasis added)" *Id.* at 1510-1511.

That part of Utah's formulation of the conduct or exhibitions proscribed in § 76-10-1203(1) which reads: "nudity, sex, or excretion" has never been construed by this Court, although it has been upheld against constitutional attack by Judges Ziegler and Taylor of the Ogden City Court and Judge Gould of the Second District Court in the proceedings below. Appellants calls upon this court to "authoritatively construe" that language.

1. *It is The Duty Of This Court To Hold An Act Of The Legislature Constitutional If It Is Possible To Do So.*

Appellants do not attack the constitutionality of the Utah Pornography Statute as applied to the facts of their cases but only on its fact. Therefore if any sex or nudity conceivably could be constitutionally proscribed by this statute, appellants concede they should stand convicted. Thus, this court is saved the unpleasant duty of examining the three magazines which are a part of the record on appeal before it.*

In a 1973 Utah Supreme Court case, *State Board of Education* v. *State Board of Higher Education*, 29 Utah 2d 110, 505 P. 2d 1193, Justice Ellett, concurring, stated:

> "Our *duty* is to hold an act of the legislature valid if it is possible to do so [citing Utah cases] (emphasis added)."

In the same case, Justice Crockett, also concurring, stated:

> "The presumption of constitutionality should be indulged . . ."

In a case cited by Justice Crockett in support of the aforequoted language, *Newcomb* v. *Ogden City Public School Teachers Retirement Commission*, 112 Utah 503, 517, 243 P. 2d 941 (1952), Chief Justice Wolfe, speaking for the court, stated that the "*duty*" of the courts was

*Should the court suspect that counsel for appellants conceded too much in limiting this attack to the facial unconstitutionality of the statute, the court need only examine any one of the three magazines to understand counsel's willingness to concede their obscentity assuming the statute is valid.

to hold legislative acts constitutional unless convinced "*beyond a reasonable doubt*" that they are unconstitutional. And, in *Gubler* v. *Utah State Teachers Retirement Board*, 113 Utah 188, 200, 192 P. 2d 580 (1948), Justice Latimer stated for the court:

> "Every presumption is in favor of the constitutionality of an act of the legislature . . ."

It has even been held that a strained construction is desirable if it is the only construction that will save constitutionality. In *Warren Sanitary Milk Co.* v. *Board of Review*, 179 N. E. 2d 385, 390 (Ct. Com. Pleas., Ohio), the court stated:

> ". . . a strained construction is not only permissible, *but desirable*, if it is the only construction that will have constitutionality. *Knights Templar's, etc., Co. v. Jarman*, 187 U.S. 197, 23 S. Ct. 108, 47 L. Ed. 139 [and citing other cases]."

2. *Cases Construing Language Similar To Or Less Specific Than "Nudity, Sex or Excretion."*

In *Miller*, the Court expressly left it open for state courts to add the requisite specificity to state statutes by judicial construction where the language of the statute itself was arguably not specific enough. In consequence of this part of the *Miller* decision, many state courts have already "authoritatively construed" their state stat-

utes. Likewise, a number of federal courts have "authoritatively construed" federal statutes on obscenity. A survey of these cases in the wake of *Miller* shows that almost all of these state and federal courts have upheld the validity of the legislation they examined.

a. *State Cases.*

On the state level, with the exception of Indiana and Louisiana, all state courts have upheld the constitutionality of their obscenity statutes against attack that they did not specifically define the sexual conduct or exhibition sought to be prohibited.

(1) In *People* v. *Hellin*, 33 N. Y. 2d 314, 307 N. E. 2d 805 (1973), the Court upheld statutory language which, like Utah's language, proscribed material if "considered as a whole its predominant appeal is to prurient, shameful or morbid interest in *nudity, sex, excretion* . . . (Emphasis added.)" In language fully applicable to the Utah Statute, the court said:

> "It takes no dictionary reference to understand what the words 'nudity', 'sex', 'excretion' . . . mean . . . It is ludicrous and preposterous to suppose that a person dealing in such material would not understand the prohibitions here. . . . When sex and nudity, and the other sorts of prohibited conduct for that matter, are exploited substantially beyond customary limits of candor and would, as the average man views it, be the predominant element in the material so as to appeal, again predominantly, to las-

> civious cravings, then there can be no doubt as to what is prohibited. *What we are talking about is hard-core pornography.* . . . Hard-core pornography consists of 'patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated [and/or] patently offensive representation or descriptions of masturbation, excretionary functions, and lewd exhibition of the genitals'." 307 N.E.2d 813

(2) In *People* v. *Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433, 438-441 (1973), the California Court of Appeals noted that the intent of *Miller* was to strengthen the prohibition against obscenity, and that to declare California's statute unconstitutional would run counter to this. The Court then construed the California obscenity statute,* containing striking similarities to Utah's, in such a way as to meet the *Miller* test.

(3) In *Price* v. *Commonwealth*, ... Va. ....., 201 S. E. 2d 798 (1974), the court held that to proscribe material, as does Utah, by reference to "nudity, sex, or excretion" satisfied constitutional requirements, stating:

"We conclude that the Virginia obscenity stat-

*"Obscene matter means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary community standards, is to prurient interet, i.e., a shameful or morbid interest in *nudity, sex or excretion;* and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance . . . (emphasis added)." California Penal Code § 311.

ute, as construed, prohibits only hard-core pornography such as the examples delineated in *Miller* and does not restrict constitutionally protected speech and writing. We do not believe that the *Miller* examples were intended to preempt or standardize state obscentity statutes, for the Supreme Court emphasized that it was not the court's function to propose regulatory schemes to the states." 201 S.E. 2d 800

(4) In *Slaton* v. *Paris Adult Theater I*, 231 Ga. 312, 201 S. E. 2d 456 (1973), on remand from the United States Supreme Court, Georgia's highest court held that the Georgia obscenity statute, which is similar to the Utah definition of obscenity,* was limited to hard-core pornography as defined by *Miller*, and thus was constitutional.

(5) Construing a statute** virtually identical to Utah's, Kentucky's highest court held that it met the constitutional standards of *Miller* in *Hall* v. *Commonwealth ex rel. Schroering*, ... Ky. ....., 505 S. W. 2d 166 (1974).

(6) In *State* v. *J-R Distributors, Inc.*, 82 Wash. 2d 584, 512 P. 2d 1049, 1059-1061 (July 27, 1973), the

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*"Matter is obscene if considered as a whole, applying contemporary standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in *nudity, sex, or excretion* . . . . (emphasis added)." Ga. Code Ann. § 26-2101(b)

**" 'Obscene' means that to the average person applying contemporary standards the predominant appeal of the matter, taken as a whole, is prurient interest, a shameful or morbid interest in *nudity, sex or excretion,* which goes substantially beyond customary limits of candor in description or representation of such matters." (emphasis added). K.R.S. § 436-101(1)(c)

court upheld a Washington statute which merely used the word "obscene" to define the proscribed conduct, stating at p. 1060:

> "We hold that the word 'obscene' as used in RCW 9.68.010 is not unconstitutionally vague when considered in the light of the Roth-Miller test. . . . As thus *authoritatively construed* by this court, RCW 9.68.010 is sufficiently definite, when measured by common understanding and practice (emphasis by the court)."

The Washington court then pointed to the authoritative construction placed by the United States Supreme Court in the 12-200-*Ft. Reels* case, *infra*, in "commenting upon a federal statute using many words similar to those in RCW 9.68.010." *Id.*, at 1060, note 6.

(7) In *Gibbs* v. *State*, ... Ark. ....., 504 S. W. 2d 719 (1974), the defendant contended, as the appellants in the case at hand, that *Miller* required that the depiction of sexual conduct sought to be prohibited must be spelled out in the statute itself.* However, the court rejected this argument by authoritively construing the statute to apply only to materials which depict patently offensive "hard-core" sexual conduct. In so doing, it stated:

"Also, we are dedicated to the proposition that

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*Arkansas' statute provided merely: " 'obscene' means that to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to the prurient interest." Ark. Stat. Ann. § 41-2730.

> we must give an act a construction that would meet constitutional tests, if it is reasonably possible to so do." 504 S.W. 2d 725

(8) In *Ebert* v. *Maryland State Board of Censors*, 19 Md. App. 300, 313 A. 2d 536 (1973), the Maryland Court upheld a state film licensing arrangement whereby a board of censors was mandated to withhold licensing from films which are "obscene," construing "obscene" by reference to the *Miller* standards of prurience and patent offensiveness.

(9) In *State* v. *Bryant*, 20 N. C. App. 223, 201 S. E. 2d 211 (1973), the court held that a North Carolina statute proscribing the selling of "any obscene writing" satisfied *Miller* after construing that term in light of the other elements of the United States Supreme Court's constitutional test of obscenity.

(10) In *State, ex rel. Wampler* v. *Bird*, ... Mo. ....., 499 S. W. 2d 780, 783-784 (1973), the Missouri obscenity statute was upheld notwithstanding it prohibited "obscene, lewd and indecent books" without a more specific description of the conduct or exhibitions sought to be proscribed, the court construing those words in light of the prurience and patently offensive elements of the *Miller* test.

(11) In *Rhodes* v. *State*, ... Fla. ....., 283 So. 2d 351 (Fla. Sup. Ct. 1973), the court held that the Florida statute met constitutional obscenity requirements although its only definition of obscene material is whether

the dominant theme of that material appeals to the prurient interest.

(12) Finally, the former Texas obscenity statute* was upheld in *West* v. *State*, 16 Cr. L. Rep. 2121 (Tex. Ct. Crim. App. 1974), wherein the Court held that *Miller* authorized the Court to judicially construe the requisite specificity needed to satisfy constitutional standards.

b. *Federal cases.*

In *United States* v. 12 200-*Ft. Reels of Super 8mm Film*, 413 U. S. 123 (1973), a case decided at the same time as *Miller*, the court considered 19 U. S. C. § 1305(a), which prohibits the importation of articles which are "obscene or immoral," without more specific definition. In sustaining the constitutionality of the section, the Court through Chief Justice Burger noted that if a "serious doubt" as to vagueness was raised by the use of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" the Court would interpret these terms as "limiting regulated material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in *Miller* . . ." *Id.*, 130, note 7. See also *United States* v. *One Reel of Film*, 481 F. 2d 206, 209-210 (1st Cir. 1973), also upholding the constitutionality of 19 U. S. C. § 1305(a), referred to in the 12 200 *Ft. Reels* case.

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*" 'Obscene' material means material . . . which is patently offensive because it affronts community standards relating to the description of sexual matters. . . ." Art. 527, Vernon's Texas Codes Ann., Penal (repealed January 1, 1974).

In *United States* v. *Thevis*, 484 F. 2d 1149 (5th Cir 1973), the Fifth Circuit Court, relying on the 12 200 *Ft. Reels* case, upheld the constitutionality of 18 U. S. C. § 1462, which defined materials sought to be proscribed from interstate commerce in no more specific terms than "obscene, lewd, lascivious, or filthy."

B. *The Utah Statute Meets the Other Elements of the United States Supreme Court Obscenity Test.*

1. *"Patently Offensive" Formulation.*

Appellants contend that because Utah Code Ann. (1953), § 76-10-1203 (Supp. 1973) fails to use the exact language they allege is required to meet minimum elements of *Miller* it is constitutionally infirm. In other words, they complain that the drafters of § 76-10-1203(1) did not have the prescience to use the same language which would appear in *Miller* six months later. A similar attack was made upon Utah's prior obscenity statute in *Gordon* v. *Christenson*, 317 F. Supp. 146 (D. Utah, 1970) and expressly rejected. Chief Judge Lewis spoke for a three judge court in *Gordon* as follows:

> Since the Utah statute does not conform exactly with the present tripartite test as enunciated in *A Book Named "John Cleland's Memoirs of a Woman of Plaesure" v. Attorney General of Com. of Massachusetts*, 383 U.S. 413, the issue is whether a criminal obscenity statute must expressly incorporate all

Supreme Court decisions defining obscenity in order to be valid. We hold that it need not. All that is required is that a statute give adequate notice and warning of what conduct is prohibited. The Utah statute accomplishes this since it contains the essential ingredients of the present constitutional standard for obscenity as reflected in judicial interpretations pertaining to creative art.

Other than giving notice, the inclusion of any definition of the word "obscene" within the statute is unnecessary. *The constitutional definition as enunciated by* Memoirs *and other decisions is automatically and impliedly included within the Utah statute by way of the Supremacy Clause of the United States Constitution and the binding effect of Supreme Court decisions interpreting that Constitution.* It is reasonable to assume that the Utah courts will recognize this supremacy and hold or instruct a jury in any prosecution under the statute according to the obscenity test enunciated in *Memoirs.* Similar conclusions have been reached in respect to other state stautes (emphasis added)." *Id.* at 148.

It is noteworthy that appellants cite no authority for their bald and unreasonable assertion that Utah's statute is constitutionally infirm because it only says that to be pornographic, material must "go substantially beyond customary limits of candor" instead of saying, as does *Miller*, the material must be "patently offensive." Assuming there is a difference between these two formu-

lations, the Supremacy Clause clearly supplies whatever might be absent in Utah's formulation.

Moreover, quite independent of the effect of the Supremacy Clause, this Court has a duty to construe the words "go beyond the customary limits of candors "in such a way as to avoid unconstitutionality, if reasonable to do so. It is eminently reasonable to construe those words to be synonymous with the words "patently offensive." This is precisely what was done by the state courts which decided the cases numbered 2 and 4, above.

2. *The Utah Statute Protects Materials Which Have "Serious Literary, Artistic, Political or Scientific Value," Independent of the Supremacy Clause.*

The third element of the test in *Miller* is apparently designed to protect against the prosecution of materials which, though dealing with sex, nudity and excretion have some serious pedogogical or otherwise justifiable purpose. The words used in *Miller* are "serious literary, artistic, political or scientific value". Utah also provides distributors of materials with the same protection, quite independent of the Supremacy Clause:

> "The following shall be affirmative defenses to prosecution under this chapter:
>
> That the distribution of pornographic material was restricted to institutions or persons having scientific, educational, governmental, or other similar justification for possessing pornogra-

phic material: . . ." Utah Code Annotated (1953) § 76-10-1208(1) (1973 Supp.).

Thus, the Utah Statute does precisely what *Miller* requires; it protects works of value.

Appellants may argue that the third element of the *Miller* test was never designed to be an affirmative defense, and that only if the statute requires the prosecution to prove lack of serious value will it pass constitutional attack. But even assuming, *arguendo*, this to be true, this court is free to hold that the burden of proving that a work lacks serious literary, ets. value *lies with the prosecution*, notwithstanding § 76-10-1208(1) is denominated an "affirmative defense" by the drafters of the statute. Such would be an acceptable "authoritative construction" in pursuance of the court's duty to uphold the statute's constitutionality when reasonable to do so.

Not only does logic thus allow this court to uphold the Utah Statute as meeting the third test of *Miller*, quite independent of the Supremacy Clause, but the Oregon Statute, which the court in *Miller* expressly approves,* can only pass the third part of the *Miller* test if a court construes the language *found in that statute's affirmative defenses* so as to meet that part of the test. Moreover, the language found in Oregon's affirmative defenses are not nearly as similar to the wording in *Miller* as that found in § 76-10-1208(1) of the Utah statute; those Oregon defenses are:

**Miller v. California, Id.* at 2615, note 6.

§ 167.085 "In any prosecution under ORS 167.065 to 167.080, it is an affirmative defense for the defendant to prove:

(1) That the defendant was in a parental or guardianship relationship with the minor; or

(2) That the defendant was a bona fide *school, museum or public library,* or was acting in the course of his employment as an employee of such organization or of a retail outlet affiliated with and *serving the educational purpose of such organization;* or

(3) That the defendant was charged with the sale, showing, exhibition or display of an item, those portions of which might otherwise be contraband forming merely an incidental part of an otherwise nonoffending whole, and serving some legitimate purpose therein other than titillation.

(4) That the defendant had reasonable cause to believe that the person involved was not a minor."

§ 167.095 "In any prosecution for violation of ORS 167.090, it shall be an affirmative defense for the defendant to prove:

(1) That the public display, even though in connection with a commercial venture, was *primarily for artistic purposes* or as a *public service;* or

(2) That the public display was of nudity, exhibited by a bona fide art, antique, or similar gallery or exhibition, and visible in a normal display setting."

Not to be forgotten, according to the reasoning of the three judge court in *Gordon, supra,* is that the "serious literary, etc. value" test would have to be read into Utah's statute by virtue of the Supremacy Clause.

C. *Utah's Statute Is Not Rendered Void By Article I, Section 15 Of The Utah Constitution.*

Appellants nakedly assert that the Utah Statute violates Article I, Section 15 of the Utah Constitution, which reads:

> "No law shall be passed to abridge or restrain the freedom of speech. . . ."

They cite no authority for relying on the Utah Constitution independently of the First Amendment. Research discloses no authority for the proposition that Article I, Section 15 affords protection to a greater scope of activities than the First Amendment.* Indeed, this court in *State* v. *Musser,* 110 Utah 534, 546, 175 P. 2d 725 (1946), quoted with approval from *Gitlow* v. *New York,* 268 U. S. 652, 45 S. Ct. 625, 630 the following:

> "That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite

*The First Amendment has been repeatedly held to apply to the states by reason of the Fourteenth Amendment. It is felt unnecessary herein to advance the thesis as to the Fourteenth Amendment set forth in *Dyett v. Turner,* 20 Ut. 2d 403.

to crime, or disturb the public peace, is not open to question."

This court is free to, and should follow *Roth* in holding that pornography, having no social value, is not speech and therefore is entitled to no constitutional protection by virtue of Article I, Section 15. Further, this court should isolate pornography from constitutionally protected speech in a way no less encroaching upon the rights of society in the quality of life and to prevent criminal behavior* than was done in *Miller.*

D. *This Court Should Affirm The Decisions Of The Two Lower Courts.*

The trial court in the case at hand had little difficulty in affirming the constitutionality of Utah Code Ann. § 76-10-1203 (Supp. 1973). The Court held that the requisite specificity could be supplied by authoritative construction as suggested by *Miller* (R-15). "Nudity" and "sex" were said to be defined by Utah Code Ann.

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*The rationale of the United States Supreme Court was enunciated in one of the six companion cases to *Miller* as follows:

". . . we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity . . . These include the interest of the public in the quality of life and total community environment, the tone of commerce in the great city centers, and, possibly the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime." *Paris Adult Theater I v. Slaton,* 413 U.S. 49, 93 S.Ct. 2628, 2635 (1973).

§ 1202 (Supp. 1973). Thus there was no question, but that the publications in the case at hand *Pole and Hole*, *Climax*, and *Love Thirsty*, fell within the aforementioned definitions.

When the action was appealed to the Second District Court, Weber County, the Court held (R-49) that the obscenity statute satisfied constitutional standards as follows:

> "Under *Miller*, and related decisions, State Courts have not only the power but the duty to construe State pornography legislation and so to construe it as to avoid a constitutional confrontation if at all possible. The terms "sex", "nudity", and "excretion" have common meaning and understanding in the English Language and give notice to all who understand that language. If a more specific definition may be helpful or necessary such specificity can be supplied by judicial construction as per *Miller* and such construction need not precede prosecution as long as the original statute is not so overboard or vague as not to be understandable. . . .
>
> The Court therefore holds the statute constitutional. . . ."

CONCLUSION

This Court should authoritatively construe the wrods "nudity and sex" according to their commonly understood meanings, as has been done in New York, Cali-

fornia, Virginia, Georgia and Kentucky (see cases nos. (1) through (5), above) so as to proscribe the hard-core pornography defined by *Miller* and involved in this case.

Respectfully submitted,

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